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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 MONEY MAILER, LLC,

9 Plaintiff,

10 v.

11 WADE G. BREWER,

12 Defendant.

NO. C15-1215RSL

ORDER REGARDING
DEFENDANT'S MOTION TO
COMPEL

13 This matter comes before the Court on "Counterclaim Plaintiff Wade Brewer's Motion to
14 Compel Discovery Responses." Dkt. # 163. Brewer asserts that Money Mailer has improperly
15 produced thousands of pages of documents without identifying to which discovery request they
16 are responsive, has refused to state whether all responsive documents have been produced, and
17 has improperly withheld documents on which its in-house counsel was copied. Having reviewed
18 the memoranda, declarations, and exhibits submitted by the parties, the Court finds as follows:
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20 **A. Production of Electronically Stored Information ("ESI")**

21 A party producing documents must either produce them as they are kept in the ordinary
22 course of business or organize and label them to correspond to the categories in the discovery
23 requests. Fed. R. Civ. P. 34(b)(2)(E)(i). Essentially, the Federal Rules of Civil Procedure require
24 that the producing party give some structure to its production: a party may not dump
25 voluminous, poorly organized documents on its adversary and force him or her "to rummage
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27 ORDER REGARDING DEFENDANT'S
28 MOTION TO COMPEL - 1

1 through piles of paper in search of what is relevant. To comply with the rule, a party must
2 rationally organize[] its productions, so that the requesting party may readily identify
3 documents, including ESI, that are responsive to [the] production requests.” *Teledyne*
4 *Instruments, Inc. v. Cairns*, 2013 WL 5781274, at * 8 (M.D. Fla. Oct. 25, 2013) (alterations in
5 original).

7 The underlying assumption of Fed. R. Civ. P. 34(b)(2)(E)(i) is that businesses have an
8 incentive to maintain their documents in a manner that allows the “systemized retrieval of
9 relevant documents” when needed, so a production of documents as kept in the ordinary course
10 of business will allow the opposing party to utilize that system and locate responsive documents.
11 *Andritz Sprout–Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 630 (M.D. Pa. 1997). When
12 producing ESI “as kept in the ordinary course of business,” the most straight-forward method is
13 to produce the device(s) (or forensic copies of the device(s)) on which the files are stored. In the
14 alternative, the responding party may choose to produce electronic files or documents rather than
15 the devices. If it does so, however, it must ensure that the ESI is produced in a format that
16 preserves the functional utility of the electronic information and provides sufficient information
17 about the context in which the information was kept and organized by the producing party so
18 that the requesting party can substantially replicate the system and find relevant documents.
19 *McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co.*, 322 F.R.D. 235, 249-50 (N.D. Tex.
20 2016).

23 A file that is converted to another format solely for production, or for which the
24 application metadata has been scrubbed or altered, is not produced as kept in the
25 ordinary course of business. . . If a document is maintained on a hard drive or in a
26 storage device in the form in which it is created and edited (its “native” format, in
27 the technical sense of the term), it must be produced in native format to be
28 produced as it is kept in the ordinary course of business. Preservation of format is

1 important because conversion from native format may eliminate or degrade search
2 and other information processing features (*e.g.*, copy, paste, and sort). Such
3 features may allow a user to identify relevant information in a document much
4 more quickly, which would significantly enhance the value of a document to a
business. Allowing a party to defeat this functionality would undermine the
purpose of producing information as it is kept in the usual course of business.

5 [In addition], the producing party must provide information about where the
6 documents are kept and how they are organized. For documents stored on a
7 computer or external storage device, this means providing system metadata
8 indicating at least the file name and path for produced files. The files and system
9 metadata[] must be organized in a manner that “permits systemized retrieval” of
files based on the metadata. In other words, the requesting party must be able to
search for and readily access files with particular characteristics (*e.g.* all .doc files
in X folder).

10 For emails, the relevant context is somewhat different. A user typically views
11 emails not in a file browser, but in an email client. While the relevant
12 organizational information for files viewed in a file browser is file name and path,
13 the relevant information in an email client is the date the email was transmitted,
perhaps along with the parties to the email (sender and recipients), and the subject
line.

14 *McKinney/Pearl Rest. Partners*, 322 F.R.D. at 250 (quoting *Teledyne Instruments*, 2013 WL
15 5781274, at * 9-10) (internal citations and footnotes omitted).

17 Brewer complains that Money Mailer’s production was not labeled to correspond with his
18 discovery requests, but Money Mailer was entitled to produce ESI as kept in the usual course of
19 business instead. Brewer all but ignores this option, simply asserting that the ESI was not
20 produced “with sufficient meta data to meaningfully identify the author, title, subject matter, or
21 unique file information” for each record. Dkt. # 159 at ¶ 4. No specific documents were
22 discussed and no examples were provided. In addition, Brewer failed to raise the alleged
23 insufficiency of Money Mailer’s metadata during the parties’ meet and confer. Dkt. # 170 at ¶ 4.
24 When Money Mailer pushed back against Brewer’s general claims of insufficiency with
25 competent evidence that it produced its ESI as it is kept in the usual course of business and with
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1 extensive metadata, Brewer withdrew its objections to the vast majority of Money Mailer's
2 production (approximately 95%), instead focusing on 1,600 pages that were produced as part of
3 plaintiff's initial disclosures, 4,045 spreadsheets or worksheets "that were not produced in
4 categorized folders," and Money Mailer's use of the word "almost" in its response
5 memorandum. Dkt. # 172 at 3-4; Dkt. # 173 at ¶¶ 3-4.
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7 None of these arguments is availing. Initial disclosures are made pursuant to Fed. R. Civ.
8 P. 26(a), which does not require either functionality or location/context when copies of
9 documents are produced. With regards to the 4,045 documents specifically mentioned by Brewer
10 in reply, he does not explain what a "categorized folder" is or how its absence impacted the
11 functionality of the ESI produced or his ability to locate responsive documents contained therein.
12 The folderol regarding Money Mailer's use of the word "almost" is difficult to comprehend.
13 Money Mailer noted that its "productions were almost exclusively email and attachments
14 collected from Money Mailer's custodians" Dkt. # 162 at ¶ 2. *See also* Dkt. # 169 at 6. As
15 discussed above, the metadata that must be produced regarding emails varies from that which
16 applies to other types of ESI. If there were a discovery violation associated with the production
17 of emails - if, for example, Money Mailer has hidden key spreadsheets or Google Drive
18 documents in dysfunctional .pdfs attached to the emails it produced - Brewer makes no effort to
19 identify or substantiate such a violation. Rather, Brewer misinterprets Money Mailer's statement
20 regarding the content of its production as a statement that it produced its documents "almost" -
21 but not entirely - in accordance with the requirements of Fed. R. Civ. P. 37. Dkt. # 172 at 3-4.
22 That is obviously not what Money Market said, and the Court is deeply troubled by Brewer's
23 attempt to salvage his motion to compel by unreasonably interpreting Money Market's statement
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1 as an admission of discovery violations.

2 **B. Statement of Completion**

3 Brewer offers no authority for his demand that Money Mailer certify that it has produced
4 all documents responsive to each discovery request. The parties' agreement regarding discovery
5 of ESI (Dkt. # 42) calls for the use of targeted search terms and contemplates technology-aided
6 searches that may or may not identify every responsive document. In addition, the rules of civil
7 procedure require a certification that a discovery response is complete at the time it is made and
8 impose an on-going duty to supplement if the production turned out to be incomplete in some
9 material respect. Fed. R. Civ. P. 26(e)(1). A separate certification such as the one requested by
10 Brewer is not required. Nevertheless, given the length of time this case has been pending and the
11 upcoming case management deadlines, when Money Mailer ceases its formal efforts to locate
12 responsive materials and has completed its anticipated production, it shall so notify defendant.

15 **C. Communications with In-House Counsel**

16 During the meet and confer held on May 17, 2018, Money Mailer apparently said
17 something that made Brewer suspect that Money Mailer had not produced internal
18 communications on which its in-house counsel was copied. Money Mailer clarified that it was
19 withholding communications with in-house counsel only when he was acting in his capacity as
20 counsel. (Money Mailer had, in fact, produced almost 500 documents that were authored by or
21 sent to in-house counsel, including a number of internal communications.) Brewer nevertheless
22 filed a motion to compel the production of Mr. Craciun's non-privileged communications, then
23 claimed victory when Money Mailer again pointed out that it was only withholding privileged
24 communications. This part of Brewer's motion to compel is wholly unsupported: he admits that
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1 he is not entitled to privileged communications and has made no effort to show that non-
2 privileged communications have been withheld. If, as asserted in reply, Brewer learned through
3 the briefing that Money Mailer did, in fact, review counsel's communications for privilege, that
4 only means that he failed to adequately confer regarding this issue before filing the motion.
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7 For all of the foregoing reasons, Brewer's motion to compel is DENIED with the
8 exception that Money Mailer shall notify Brewer when it ceases its formal efforts to locate
9 responsive materials and has completed its anticipated production. Because Brewer failed to
10 acknowledge Money Mailer's right to produce documents as kept in the usual course of
11 business, failed to adequately confer regarding the sufficiency of the metadata produced with
12 Money Mailer's ESI, failed to show that the ESI production was inadequate in any way, failed to
13 adequately confer regarding the nature and scope of Money Mailer's privilege review, and failed
14 to show that he was entitled to any additional production, the motion to compel was not
15 substantially justified and Money Mailer is entitled to an award of reasonable expenses incurred
16 in opposing the motion. Money Mailer shall, within fourteen days of the date of this Order,
17 submit a properly supported statement of fees and costs, which shall be noted on the Court's
18 calendar for the third Friday after filing.
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22 Dated this 30th day of March, 2020.

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24 Robert S. Lasnik
25 United States District Judge
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